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No. 87-1847

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

RACHEL ARONSON,
a minor, by Pamela Aronson, her mother,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for Writ of Certiorari
to the Massachusetts Supreme
Judicial Court

BRIEF IN OPPOSITION FOR RESPONDENT COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether the judgment of the Supreme Judicial Court of Massachusetts in this case is a "final" judgment reviewable under 28 U.S.C. § 1257.

2. Whether the denial of petitioner's motion for class certification under state law presents a question under the Due Process Clause which warrants review by this Court.

3. Whether the Equal Protection Clause permits a State to tax interest on out-of-state bank deposits at a higher rate than interest on in-state deposits, in an effort to recover the State's higher costs of verification and collection of the out-of-state income.

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COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Judicial Court of
Massachusetts

Pursuant to Supreme Court Rule 22, respondent Commonwealth of Massachusetts submits this brief in opposition to the petition for a writ of certiorari. The writ should be denied because (1) the

judgment below is not "final" and is therefore not reviewable under 28 U.S.C. § 1257(3); (2) the motion for class certification was correctly denied under state law and presents no issue under the Due Process Clause worthy of review by the Court; and (3) the Supreme Judicial Court of Massachusetts correctly applied the decisions of this Court in upholding the tax in question under the Equal Protection Clause.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 401 Mass. 244, 516 N.E. 2d 137 (1987), and appears as Appendix A to the petition. The order of the same court denying

rehearing is not reported and appears as Appendix B to the petition. The memorandum and order of the Superior Court of Massachusetts is not reported and appears as Appendix C to the petition.

JURISDICTION

Petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(3). Pet. 2-3. Section 1254(1) by its terms applies only to cases decided by the federal courts of appeals, and not to cases decided by the highest court of a state. In addition, for the reasons set forth in Section I, below, § 1257(3) does not confer jurisdiction in this case because the judgment below is not "final."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts the statement of constitutional provisions and statutes set forth in the petition at pages 3-5, but adds the following Massachusetts statute and rule set forth in the addendum to this brief: Mass. Gen. Laws Ann. c. 62C, § 37; Mass. Rule Civ. P. 23(b).

STATEMENT OF THE CASE

Pursuant to the Supreme Court Rule 34.2, Massachusetts supplements petitioner's statement of the case with the facts set forth in Section III of respondent's reasons for denying the

writ, infra. Those facts concern the costs incurred by Massachusetts in the audit, verification, and collection of taxes on income earned on out-of-state bank deposits. These supplemental facts are primarily drawn from the decision of the Supreme Judicial Court of Massachusetts and appear at Pet. App. 17-20. Other of these facts appear in the affidavits reproduced at pages A31- A37 of the appendix to the briefs filed in the Supreme Judicial Court of Massachusetts.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the judgment below is not "final" and is therefore not reviewable under 28 U.S.C.

§ 1257(3). Alternatively, the writ should be denied because the issues presented are not "of such gravity and general importance,"(In Re Woods, 143 U.S. 202, 206 (1892)), as to warrant discretionary review.

I. THE JUDGMENT BELOW IS NOT A "FINAL" JUDGMENT REVIEWABLE UNDER 28 U.S.C. § 1257(3).

Title 28 U.S.C. § 1257 authorizes the Court to review by appeal or certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" (emphasis added). In this case, the judgment of the Massachusetts Supreme Judicial Court was not "final" because it remanded the case for trial of the Commerce Clause issue. Pet. App. A29. Accordingly, the

entire petition should be denied for want of jurisdiction.

In determining the finality of a state court decision, the Court examines "both the judgment and the opinion as well as other circumstances which may be pertinent." Gospel Army v. Los Angeles, 331 U.S. 543, 548 (1947). An appealable judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." Collins v. Miller, 252 U.S. 364, 370 (1920). If a remand to a state trial court will result in the trial of a federal question, the judgment is nonfinal and nonreviewable. See San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 632-33 (1981); Flynt v. Ohio, 451 U.S. 619 (1981); R. Stern, E. Gressman, and S. Shapiro,

Supreme Court Practice (6th ed. 1986) § 3.8.

The requirement of finality set forth in § 1257 "serves several ends: (1) it avoids piecemeal review [by federal courts] of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; and (3) it limits Federal review of state court determinations of federal constitutional issues to leave at a minimum Federal intrusion in state affairs." North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 159 (1973). Each of these purposes would be furthered in this case by the denial of the writ for want of jurisdiction.

The concluding paragraph of the opinion of the Supreme Judicial Court in

this case (Pet. App. A29) clearly contemplates further proceedings on a federal question:

> The order denying Aronson's motion for summary judgment is affirmed. The judgment in favor of the Commonwealth is reversed, and the case is remanded for a trial limited to the commerce clause claim.

Because the Massachusetts Supreme Judicial Court has remanded this case for trial, its decision "is not final 'as an effective determination of the litigation.'" O'Dell v. Espinoza, 456 U.S. 430 (1982)(dismissing writ because state supreme court had remanded for trial of Due Process Clause claims), quoting Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 551 (1945). After trial in this case, the Massachusetts Superior Court will enter

a final judgment on petitioner's Commerce Clause claim. Appellate review of that judgment may then be pursued, and further review of all federal issues may be sought in this Court under 28 U.S.C. § 1257. Thus "the remaining litigation may raise other federal questions that may later" be presented to the Court. San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 633 (1981)(judgment in "taking" case not final in light of uncompleted proceedings on amount of compensation). The judgment below is accordingly not "final" as that term is used in § 1257 and applied by the Court.

The Court has, in limited circumstances, treated state court judgments as final for jurisdictional purposes despite the prospect of further

proceedings in a state court. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)(discussing four categories of such cases). The decision of the Massachusetts Supreme Judicial Court in this case, however, is not a final judgment within any of the four exceptions identified in Cox. The Court has noted that "in most, if not all, of the cases falling within the four [Cox] exceptions . . . there were no other federal issues to be resolved." Flynt v. Ohio, 451 U.S. 619, 621 (1981). In those cases "[t]here was thus no probability of piecemeal review with respect to federal issues." Id.

In this case, however, the remand to the state trial court is for the express and exclusive purpose of a trial on the federal Commerce Clause claim. Pet.

App. A29. A final judgment on that claim may lead to another petition in this Court. For this reason, review of the issues presented in the pending petition will create precisely the same "probability of piecemeal review" of federal isues which the requirement of finality in § 1257 is designed to avoid.

Further, review by this Court in this case "can await final judgment without any adverse effect upon important federal interests." Flynt v. Ohio, 451 U.S. at 622. Petitioner's motion for class certification was made under state rules of civil procedure, and the issue implicates exclusively state, not federal concerns. See Section II, below. Further, since this case concerns only taxation, the federal interest in equal protection of the laws

may be protected, and any constitutional injury repaired, by a favorable judgment (on either of the federal claims) which returns the allegedly unlawful tax. Thus "there is no identifiable federal policy that will suffer" (id.) if review by this Court is postponed until a final judgment is entered on the Commerce Clause claim.

Finally, the close relationship between petitioner's Commerce Clause and Equal Protection Clause claims further counsels against piecemeal review by this Court. "[W]here further proceedings on remand will shed additional light on the record, and thereby remove factual ambiguities that preclude an informed judgment on a constitutional issue, there is a compelling reason for concluding that a final judgment has not

been rendered." R. Stern, E. Gressman & S. Shapiro, supra at 129, citing Minnick v. California Dept. of Corrections, 457 U.S. 105 (1981). See Gospel Army v. Los Angeles, 331 U.S. at 547 (judgment not final where, inter alia, party may "present new facts" at trial). The evidence presented by the Commonwealth at the trial of the Commerce Clause claim may ultimately aid review of the equal protection claim by this Court. For example, additional evidence on the costs of verification and collection of out-of-state income may further support the rationality of the tax under the Equal Protection Clause. See Section III, below. For this additional reason, piecemeal review should be avoided in this case.

In sum, 28 U.S.C. § 1257(3) does not authorize review of the issues presented by the petition because the judgment of the Massachusetts Supreme Judicial Court is not "final." Further, petitioner has not shown that her petition falls within any exception to the general rule of finality. For these reasons, the petition should be denied for want of jurisdiction.

II. THE DENIAL OF CLASS CERTIFICATION UNDER STATE LAW DID NOT VIOLATE THE DUE PROCESS CLAUSE.

Even if the judgment below is final and reviewable under 28 U.S.C. § 1257(3), the writ should be denied be- cause the two issues presented by the petition are not worthy of review by the Court.

Petitioner first argues that the denial of her motion for class certification "is a denial of due process."[1/] Pet. 9-18. Petitioner does not claim, however, that the issue is one of national significance, or that similar claims have received uneven treatment

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1/ Petitioner has not preserved this issue for this Court. In previous cases, the Court has denied certiorari where a federal constitutional issue is raised for the first time in a petition for review. E.g., Moore v. Illinois, 408 U.S. 786, 799 (1972). In this case, the question of class certification was briefed by the parties in the Supreme Judicial Court, but neither party raised a constitutional issue. Aronson's six-page petition for rehearing in the Supreme Judicial Court reargued the state-law question presented in her initial brief. In passing she suggested, without citation, that the denial of class certification would be "tantamount to a denial of due process." Pet. for Rehearing at 3.

by state and federal courts.[2/] The Court should deny review because petitioner's "due process" claim, like most class certification issues, rests upon facts unique to this case, and, in this case, the claim relies upon state tax law not shown by petitioner to be similar to that of other states.

The writ should also be denied on the issue of class certification because the decision below is consistent with Massachusetts law and the Due Process Clause. Petitioner does not argue that her property has been taken without due

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2/ Nor could she so claim. The denial of class certification is part of the daily grist of state and federal trial practice. Under petitioner's theory, virtually every denial of class certification would present a constitutional issue worthy of plenary review.

process, only that putative class members have suffered a deprivation by the erroneous denial of class certification. See Pet. 12. As the state court record stands, petitioner can represent only her own interest. That interest was fully protected because petitioner received an adequate opportunity to file her motion for class certification and her supporting affidavit and memorandum. S.J.C. App. at A24-A29. The trial court understandably did not decide the motion, in light of its decision on the merits. See Pet. App. C1-C9. On appeal, the Supreme Judicial Court decided the motion because it expected the issue to arise upon remand of the case to the trial court for

further proceedings on the Commerce Clause issue. Pet. App. A28.

In denying certification, the Supreme Judicial Court applied settled principles of state law governing declaratory judgments and class actions.[3/] The decision below is also consistent with federal law governing class certification. Under Federal Rule of Civil Procedure 23(b)(which contains language identical to the relevant portion of Massachusetts R.C.P. 23(b)), a court

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3/ Even if the Supreme Judicial Court erred in its application of state law, a "merely erroneous decision" on a "question of state law" does not deprive the unsuccessful party of property without due process of law. Corporation of the Presiding Bishop v. Hodel, 637 F. Supp. 1398, 1409 (D.D.C. 1986), quoting American Railway Express Co. v. Kentucky, 273 U.S. 269, 273 (1927) and Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 680 (1930). See also Beck v. Washington, 369 U.S. 541, 554-5 (1962).

must find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In making that finding, a federal court considers the availability of administrative proceedings which might embrace the claim before the court.[4/] In this case, the Supreme Judicial Court correctly noted state statutory remedies which would allow affected taxpayers to obtain the benefit of any subsequent

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4/ Kamm v. California City Development Co., 509 F. 2d 205, 211-212 (9th Cir. 1975); Patillo v. Schlesinger, 625 F. 2d 262, 264-5 (9th Cir. 1980); 7A Wright and Miller, Federal Practice and Procedure, Civil § 1779 (1986)("Since the purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of settling the controversy, it seems consistent with that purpose to determine whether any administrative methods of settling the dispute exist.")

judgment which invalidated the tax. Pet. App. A28-A29. See Mass. Gen. Laws Ann. c. 62C, § 37. The court below properly relied on the availability of these remedies for its denial of class certification. The Due Process Clause did not compel a contrary result. See Matthews v. Diaz, 426 U.S. 67, 71-72 n. 3 (1976)(criticizing the certification of a class in a constitutional case which included persons who had not applied for Medicare benefits).

For these reasons, the writ should be denied on the question of class certification.

III. THE COURT BELOW CORRECTLY UPHELD THE TAX UNDER THE EQUAL PROTECTION CLAUSE.

Petitioner also seeks review of that portion of the decision below which rejected her claim that the Massachusetts tax violates the Equal Protection Clause of the Fourteenth Amendment. Pet. 19-24; Pet. App. A24-A25. The Court should deny the writ on this issue because the decision below is consistent with the cases of this Court and petitioner has not shown any other reason why the issue is worthy of plenary review.

The Supreme Judicial Court correctly noted the deferential standard of judicial review applied to tax classifications under the Equal Protection

Clause. Pet. App. A24-A25, citing Madden v. Kentucky, 309 U.S. 83, 87-90 (1940). "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547 (1983). Accord, Mueller v. Allen, 463 U.S. 388, 396 (1983). In such cases, the burden is on the taxpayer "to negative every conceivable basis which might support" the classification. Madden v. Kentucky, 309 U.S. at 88. The Equal Protection Clause permits a legislature to draw any line which rests upon a rational basis. Regan, 461 at 547. So long as a classification rests on "differences pertinent to the subject in respect of which the classification is made" it will be upheld. Power Mfg. Co.

v. Saunders, 274 U.S. 490, 494 (1927).

In this case, the higher tax rate applied to Aronson's income rationally furthers the Commonwealth's interest in the recovery of its higher costs of audit, verification and collection of income received by Massachusetts residents from their bank deposits in other states. These administrative efforts and their costs are described in affidavits filed by the Commonwealth below (S.J.C. App. A31-A37) and summarized by the Supreme Judicial Court at Pet. App. A17-A20.

In rejecting an equal protection challenge to similar state taxation, Madden v. Kentucky relied upon administrative costs as a legitimate

state purpose. Id. at 89-90. Madden upheld a Kentucky tax that distinguished between in and out-of-state deposits and stated that "[t]he treatment accorded the two kinds of deposits may have resulted from differences in the difficulties and expenses of tax collection."[5/]

The Supreme Judicial Court cited Madden and correctly upheld the Massachusetts tax under the Equal Protection Clause. Pet. App. A24-A25. Nothing in

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5/ Similarly, in upholding a tax intended to fund unemployment benefits, the Court has held that "[a]dministrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others." Carmichael v. Southern Coal Co., 301 U.S. 495, 511 (1937).

the petition suggests a conflict between the decision below and other cases of this Court.[6/] Since there is no other ground urged in support of review of the equal protection claim, that portion of the petition should be denied, even if the Court deems the judgment below to be "final."

6/ The decision below does not conflict with Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985). See Pet. 23. The rational basis for the tax in this case was not offered as support for the Alabama law in Ward, and Ward does not suggest that Madden v. Kentucky was wrongly decided.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 14, 1988

ADDENDUM

Mass. Gen. Laws c. 62C, § 37:

Any person aggrieved by the assessment of a tax, other than a tax assessed under chapters sixty-five or sixty-five A, may apply in writing to the commissioner, on a form approved by him, for an abatement thereof at any time within three years from the last day for filing the return for such tax, determined without regard to any extension of time, within two years from the date the tax was assessed or deemed to be assessed, or within one year from the date that the tax was paid, whichever is later.

The Commissioner shall, if requested, give the applicant a hearing upon his application; and if the

commissioner finds that the tax is excessive in amount or illegal, he shall abate the tax, in whole or in part, accordingly. The commissioner shall give notice to the applicant of his decision upon the application.

If such person is an operator as defined in section one of chapter sixty-four G, or a vendor as defined in section one of chapter sixty-four H, or section one of chapter sixty-four I, who has collected such tax, no actual refund of money shall be made to such person until he establishes to the satisfaction of the commissioner, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which the application for refund is made.

Mass. R. Civ. P. 23(b):

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.